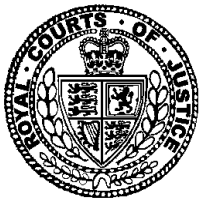

Neutral Citation Number: [2019] EWCA Civ 784

Case No: C4/2017/3270

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM**
**THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**
**MR JUSTICE HOLMAN**
**CO/6378/2016**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/05/2019

**Before:**

**LORD JUSTICE FLOYD**
**LORD JUSTICE HOLROYDE**
and
**LORD JUSTICE HADDON-CAVE**

- - - - - - - - - - - - - - - - - - - - -

**Between:**

| | |
|---|---|
| **THE QUEEN ON THE APPLICATION OF TM (KENYA)** | **Appellant** |
| **(anonymity order made)** | |
| **- and -** | |
| **SECRETARY OF STATE FOR THE HOME DEPARTMENT** | **Respondent** |

- - - - - - - - - - - - - - - - - - - - -

**STEPHEN KNAFLER QC & ELEANOR MITCHELL** (instructed by **DUNCAN LEWIS SOLICITORS**) for the **APPELLANT**
**ROBIN TAM QC & JULIE ANDERSON** (instructed by **GOVERNMENT LEGAL DEPARTMENT**) for the **RESPONDENT**

Hearing date: 26th March 2019

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# Approved Judgment

## Lord Justice Holroyde:

1. A person who is held in immigration detention may in certain limited circumstances be removed from free association with the general population of detainees in the Immigration Removal Centre ("IRC"). This appellant, whilst detained at Yarl's Wood IRC ("Yarl's Wood"), was removed from association between 1230 on 1st August and 1610 on 2nd August 2016. She brought judicial review proceedings against the respondent challenging the lawfulness of that removal from association ("RFA") and raising issues - not previously considered by the courts - as to the legal and policy framework governing the use of RFA in an IRC or immigration detention centre. At a contested hearing before Holman J ("the judge") she was successful only to the limited extent of being awarded a declaration that her RFA from and after 1230 on 2nd August 2016 was unlawful and an unjustified breach of her right to private life under article 8 of the European Convention on Human Rights ("the Convention"). In this appeal, she challenges the adverse decisions of the judge on other aspects of her claim.

## The appellant's immigration history

2. The appellant, now aged 40, is a national of Kenya. She was granted limited leave to enter the United Kingdom as a student in 1998. Her limited leave was extended more than once, but expired on 30th November 2003. She made a number of applications for further leave to remain, all of which were refused. Her appeal rights were exhausted by November 2009. By that time, she had been served with an enforcement notice as an overstayer liable to removal. She had also been sent a notice requiring her to report to the immigration authorities. She failed to do so on three occasions in 2010 and early 2011. In July 2011 she reported as required, but left the building when she was told she would be interviewed. She thereafter failed to attend on any other due date, and was treated as an absconder until June 2012 when her solicitors notified the authorities of her new address.

3. On 14th March 2013 the appellant applied for leave to remain on compassionate grounds. That application was refused, with no right of appeal, on 1st May 2013. In July 2013 the appellant began proceedings claiming judicial review of the decision of 1st May. Permission to apply for judicial review was refused, and certified as being totally without merit, on 10th March 2014.

4. A further application for leave to remain, relying on article 8 grounds, was made on 2nd February 2015. It was refused in April 2015, by which time the appellant had again failed to report on a number of occasions and was again being treated as an absconder. The refusal was confirmed on reconsideration in August 2015.

5. On 1st April 2016 the appellant was encountered during an enforcement visit by immigration authorities. She was uncooperative and non-compliant. She was served with enforcement notices and detained at Yarl's Wood. She made an application for leave to remain, and on 21st April 2016 made further submissions in support of that application, relying on article 8. Those submissions were rejected, with no right of appeal, on 28th April. The appellant made an application for judicial review, and applied for a stay of her removal. The application for a stay was refused by an Upper Tribunal judge on 29th April 2016. Removal directions had been set for 5th May 2016, but were cancelled as a result of the appellant's disruptive conduct on that date. That

conduct was the subject of an investigation, which included review of CCTV footage. The investigation established that when officers arrived to take her to the airport, the appellant - who said she had just taken a shower - was naked save for her underwear and covered in coconut oil or body lotion. She refused to walk with the officers, and more than once dropped to the floor. The officers had great difficulty in holding and moving her. The appellant complained that excessive force was used upon her, though that complaint was rejected following the investigation. The appellant was placed in RFA overnight. That period of RFA was not challenged in the present proceedings.

6. Further removal directions were set for 19th May 2016. There was no RFA in advance of that date. The appellant was physically compliant with her removal from Yarl's Wood. However, as she was being taken to the airport, she claimed asylum, a claim which she had not made at any time previously since her arrival in the United Kingdom in 1998. Her removal therefore did not proceed.

7. On 23rd May 2016 her application of 1st April was refused as invalid. In mid-June 2016 the respondent accepted a Rule 35 report as independent evidence that the appellant was a potential victim of torture. On 30th June 2016 the appellant's asylum claim was refused by the respondent and certified under section 96 of the Nationality, Immigration and Asylum Act 2002.

8. Further removal directions were given, and the appellant was notified on 26th July 2016 that she would be removed to Kenya. On 29th July 2016 the appellant through her solicitors made further representations as to why she should be granted leave to remain and challenged the certification under section 96 of the 2002 Act. On 2nd August 2016 (by which time the appellant had been removed from association, as explained below) a claim for judicial review of the decision of 30th June 2016 was commenced. Permission to apply for judicial review was subsequently refused by the Upper Tribunal, and the claim was certified as totally without merit. At the date of the hearing before Holman J, that certification was itself the subject of an application for permission to appeal to this court. That application was subsequently refused.

**The removal from association on 1st and 2nd August 2016**

9. The respondent intended to remove the appellant to Kenya on 3rd August 2016. On 1st August 2016 an Orderly Officer, M Robinson, completed a report which was entered on a document "Maintenance of Security and Safety Notice. Form DCF1: Removal from Association (DC Rule 40)". For convenience, I shall refer to this form as "the form DCF1". The report was in the following terms:

> "[The appellant] will be relocated to Kingfisher under DC Rule 40 in preparation for her imminent removal directions. This is due to previous non-compliance with removal directions including her removing her clothing and covering herself in oil on the 5th May 2016.
>
> Due to this previous incident taking place on the residential unit and causing a risk of disruption to the safety and security of the establishment it has been deemed appropriate to relocate [the appellant] in advance of her red letter window removal

> directions. This is with the aim for a more controlled removal to minimise risk of disruption to the good order and security of the centre."

At 1130 that morning, the RFA was authorised by Ms Fiona Quaynor, who was at the material time the Home Office Immigration Enforcement Manager at Yarl's Wood, and the appointed "contract monitor" at Yarl's Wood for the purposes of section 49 of the Immigration and Asylum Act 1999 (to which I refer below). Ms Quaynor entered the date and time, and her signature, in a section of the form DCF1 headed "Authority for initial 24 hours RFA (cases of urgency)".

10. It should be noted that a second page of the form DCF1, with sections for "Reasons for continued RFA" and "Authority for RFA beyond 24 hours (authority of S of S)" did not contain any entries.

11. Later on 1st August 2016 the appellant's solicitors made representations challenging her RFA. The respondent replied, reiterating the reasons for the RFA which had been given on the form DCF1. The RFA was subsequently continued beyond the 24 hours which had initially been authorised.

12. As a result of the issue of the judicial review proceedings on 2nd August 2016 (see [8] above), the removal directions were cancelled and the appellant returned to the general population of the IRC.

13. On 1st November 2016 the appellant commenced these proceedings, challenging the RFA. Before addressing the grounds of that challenge, it is convenient to consider the relevant legal framework and the caselaw on which the parties principally relied.

## The legal framework

14. The respondent has the power to contract out the management of IRCs and detention centres, and in almost all cases has done so. Yarl's Wood is, and was at all material times, a contracted-out IRC. Section 148 of the Immigration and Asylum Act 1999 ("IAA 1999") provides that a manager must be appointed for every removal centre. In the case of a contracted-out removal centre, the person so appointed must be a detainee custody officer whose appointment is approved by the respondent. By section 148(3), the manager of an IRC has such functions as are conferred on him by removal centre rules made pursuant to section 153 of IAA 1999. By section 148 (4) and (5):

> "(4) The manager of a contracted-out removal centre may not –
>
> (a) enquire into a disciplinary charge laid against a detained person;
>
> (b) conduct the hearing of such a charge; or
>
> (c) make, remit or mitigate an award in respect of such a charge.
>
> (5) The manager of a contracted-out removal centre may not, except in cases of urgency, order –

> (a) the removal of a detained person from association with other detained persons;
>
> (b) the temporary confinement of a detained person in special accommodation; or
>
> (c) the application to a detained person of any other special control or restraint other than handcuffs)."

15. Section 149 of IAA 1999 contains provisions relating to the contracting out of IRCs. Of relevance to the present appeal, sub-sections (4) to (8) provide:

> "(4) The Secretary of State must appoint a contract monitor for every contracted-out removal centre.
>
> (5) A person may be appointed as the contract monitor for more than one removal centre.
>
> (6) The contract monitor is to have –
>
> (a) such functions as may be conferred on him by removal centre rules;
>
> (b) the status of a Crown servant.
>
> (7) The contract monitor must –
>
> (a) keep under review, and report to the Secretary of State on, the running of a removal centre for which he is appointed; and
>
> (b) investigate, and report to the Secretary of State on, any allegations made against any person performing custodial functions at that centre.
>
> (8) The contractor, and any sub-contractor of his, must do all that he reasonably can (whether by giving directions to the officers of the removal centre or otherwise) to facilitate the exercise by the contract monitor of his functions."

16. The phrase "custodial functions" used in section 149(7)(b) is defined in section 147 of IAA 1999 as meaning "custodial functions at a removal centre".

17. The Detention Centre Rules 2001, made pursuant to IAA 1999, include (in part III) provisions relating to the maintenance of security and safety. Rule 40 of the 2001 Rules (to which I shall refer for convenience as "Rule 40") is in the following terms:

> "40 Removal from association
>
> 1) Where it appears necessary in the interests of security or safety that a detained person should not associate with other detained persons, either generally or for particular

> purposes, the Secretary of State (in the case of a contracted–out detention centre) or the manager (in the case of a directly managed detention centre) may arrange for the detained person's removal from association accordingly.
>
> 2) In cases of urgency, the manager of a contracted-out detention centre may assume the responsibility of the Secretary of State under paragraph (1) but shall notify the Secretary of State as soon as possible after making the necessary arrangements.
>
> 3) A detained person shall not be removed under this rule for a period of more than 24 hours without the authority of the Secretary of State.
>
> 4) An authority under paragraph (3) shall be for a period not exceeding 14 days.
>
> 5) Notice of removal from association under this rule shall be given without delay to a member of the visiting committee, the medical practitioner and the manager of religious affairs.
>
> 6) Where a detained person has been removed from association he shall be given written reasons for such removal within 2 hours of that removal.
>
> 7) The manager may arrange at his discretion for such a detained person as aforesaid to resume association with other detained persons, and shall do so if in any case the medical practitioner so advises on medical grounds.
>
> 8) Particulars of every case of removal from association shall be recorded by the manager in a manner to be directed by the Secretary of State.
>
> 9) The manager, the medical practitioner and (at a contracted–out detention centre) an officer of the Secretary of State shall visit all detained persons who have been removed from association at least once each day for so long as they remain so removed."

18. It should be noted that Rule 2 of the 2001 Rules defines a manager as a person appointed under section 148 of the IAA 1999.

19. The respondent has issued an Operating Standards manual for IRCs which contains standards for the management of IRCs in accordance with the Rules. This manual contains "minimum auditable requirements" in respect of RFAs and sets the following Standard:

> "The use of removal from association must achieve the correct balance between the need to maintain safety and security and the need to show due regard for the dignity of the individual. Procedures must comply with the requirements of Rule 40."

20. Subsequent to the decision of Holman J, and whilst this appeal was pending, there has come into force the Detention Services Order 02/2017 of July 2017, which contains instruction and guidance on the use of RFA pursuant to Rule 40. The Order cites Rule 40 and the Operating Standard. It contains provisions as to the nature of the accommodation which may be used for detainees subject to RFA, and as to the treatment of vulnerable detainees with particular reference to those with mental health problems. In the case of a contracted-out IRC, it permits a Home Office employee of Executive Officer grade or above to authorise an initial period of RFA under Rule 40. In the case of a directly managed IRC, such authorisation may be given by the centre manager or duty manager. Although that Order was not in force at the material time, it is relevant to note that Ms Quaynor was a Higher Executive Officer at the time she authorised the appellant's RFA.

21. I next summarise briefly the principal authorities to which counsel referred in their submissions.

**Relevant caselaw**

22. The decision of this court in *Carltona Limited v Commissioners of Works* [1943] 2 All ER 560 ("*Carltona*") established the principle that functions given to government ministers can be exercised on their behalf by responsible officials of the government department concerned. At p563B, Lord Greene MR said:

> "Constitutionally, the decision of such an official is of course the decision of the minister."

23. In *R v Secretary of State for the Home Department, ex parte Oladehinde* [1991] 1 AC 254 ("*Oladehinde*") deportation decisions made by Home Office officials in the immigration department were challenged on the ground that the Secretary of State had unlawfully delegated his power to make decisions under section 3(5)(a) of the Immigration Act 1971. The House of Lords held that immigration officers were Home Office civil servants rather than holders of a statutory office and that the Secretary of State was entitled to authorise them to make decisions on his behalf under section 3(5)(a). Lord Griffiths, with whom the other Law Lords agreed, referred to the *Carltona* principle and said at p303B that a minister's statutory duty may generally be exercised by a member of his department for whom he accepts responsibility, though Parliament could require the Minister to exercise the power personally. There was no such requirement in respect of a decision to deport, and the Act would not be workable if there were. He went on to say, at p303E-H:

> "The immigration service is comprised of Home Office civil servants for whom the Secretary of State is responsible and I can for myself see no reason why he should not authorise members of that service to take decisions under the *Carltona* principle providing they do not conflict with or embarrass them in the discharge of their specific statutory duties under the Act

> and that the decisions are suitable to their grading and experience.
>
> It has been recognised that it would not be right to authorise an inspector to take a decision to deport in any case upon which he had been engaged as an immigration officer for to do so would be too much like asking a prosecutor to be judge in the same cause. But in a case in which he has been in no way personally involved I am unable to see any good reason why the decision to deport in a section 3(5)(a) case should not be left to an immigration inspector. He will be a person of comparable grade to those who previously took the decision and equally experienced in immigration matters. There was a suggestion that because immigration officers were primarily concerned with control of entry and policing functions in respect of illegal immigrants there might be an ethos in the service that would lead too readily to a decision to deport. There was no evidence to support this suggestion and I can see no reason why senior members of the service should be tarred with this image, and in any event their decisions are reviewed in the deportation department before the order is signed by the Secretary of State."

24. In *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245 ("*Lumba*") foreign nationals against whom deportation orders had been made, and who had been detained under immigration powers, successfully challenged the lawfulness of their detention on the ground that they had been detained pursuant to an unpublished blanket policy which was inconsistent with both the relevant published policy and the relevant statutory power of detention. Lord Dyson JSC at [32] referred to decisions of the European Court of Human Rights which emphasised the particular importance of the principle of legal certainty where deprivation of liberty is concerned. He went on to say, at [34-35] –

> "34. The rule of law calls for a transparent statement by the executive of the circumstances in which the broad statutory criteria will be exercised. Just as arrest and surveillance powers need to be transparently identified through codes of practice and immigration powers need to be transparently identified through the immigration rules, so too the immigration detention powers need to be transparently identified through formulated policy statements.
>
> 35. The individual has a basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute: see *In re Findlay* [1985] AC 318, 338E. There is a correlative right to know what that currently existing policy is, so that the individual can make relevant representations in relation to it. …"

25. At [38], Lord Dyson added that what must be published –

> "… is that which a person who is affected by the operation of the policy needs to know in order to make informed and meaningful representations to the decision-maker before a decision is made."

26. In *R (Detention Action) v First-tier Tribunal (Immigration and Asylum Chamber)* [2015] EWCA Civ 840, [2015] 1 WLR 5341 ("*Detention Action*") this court considered the legality of the Fast Track Rules in relation to appeals to the First-tier Tribunal against refusals of asylum applications where the applicant had been detained at an IRC. It was contended successfully that the entire fast-track appeal system was structurally unfair. At [27] Lord Dyson MR (with whom Briggs and Bean LJJ agreed) accepted a submission that the authorities showed the following general principles applicable to such a challenge:

> "(i) in considering whether a system is fair, one must look at the full run of cases that go through the system;
>
> (ii) a successful challenge to a system on grounds of unfairness must show more than the possibility of aberrant decisions and unfairness in individual cases;
>
> (iii) a system will only be unlawful on grounds of unfairness if the unfairness is inherent in the system itself;
>
> (iv) the threshold of showing unfairness is a high one;
>
> (v) the core question is whether the system has the capacity to react appropriately to ensure fairness (in particular where the challenge is directed to the tightness of time limits, whether there is sufficient flexibility in the system to avoid unfairness; and
>
> (vi) whether the irreducible minimum of fairness is respected by the system and therefore lawful is ultimately a matter for the courts."

27. In *R (Bourgass) v Secretary of State for Justice* [2015] UKSC 54, [2016] AC 384 ("*Bourgass*") prisoners who had been segregated pursuant to rule 45 of the Prison Rules 1999, as amended, successfully challenged their segregation on the grounds that it amounted to a breach of their rights under article 6 of the Convention and their common law rights to procedural fairness. Rule 45 provided –

> "(1) Where it appears desirable, for the maintenance of good order or discipline or in his own interests, that a prisoner should not associate with other prisoners, either generally or for particular purposes, the governor may arrange for the prisoner's removal from association accordingly.
>
> (2) A prisoner shall not be removed under this rule for a period of more than 72 hours without the authority of the Secretary of State and authority given under this paragraph shall be for a

> period not exceeding 14 days but it may be renewed from time to time for a like period."

The segregation of the prisoners had in each case been ordered by the prison governor and had been reviewed after 72 hours by a segregation review board established pursuant to Prison Service Order 1700 (a non-statutory document issued by the Secretary of State) and chaired by a senior officer within the prison. It was common ground that the PSO purported to confer on a prison officer, the chair of the review board, the power to authorise the continued segregation of a prisoner after the initial period of 72 hours which had been ordered by the governor. The Secretary of State argued that by virtue of the *Carltona* principle, the decision of the governor or of the chair of the review board was the decision of the Secretary of State.

28. The Supreme Court rejected that argument. It held that prison governors were constitutionally separate from the Secretary of State and his departmental officials. At [50-52] Lord Reed JSC, with whom the other Justices of the Supreme Court agreed, explained:

> "An official in a government department is in a different constitutional position from the holder of a statutory office. The official is a servant of the Crown in a department of state established under the prerogative powers of the Crown, for which the political head of the department is constitutionally responsible. The holder of a statutory office, on the other hand, is an independent office-holder exercising powers vested in him personally by virtue of his office. He is himself constitutionally responsible for the manner in which he discharges his office. The *Carltona* principle cannot therefore apply to him when he is acting in that capacity.
>
> 51. It is possible that a departmental official may also be assigned specific statutory duties. In that situation, it was accepted in *R v Secretary of State for the Home Department, ex parte Oladehinde* … that the official remained able to exercise the powers of the Secretary of State in accordance with the *Carltona* principle.
>
> 52. It is also possible that the performance of statutory ministerial functions by officials, or by particular officials, may be inconsistent with the intention of Parliament as evinced by the relevant provisions. In such circumstances, the operation of the *Carltona* principle will be impliedly excluded or limited: *Oladehinde* at p303. Furthermore, the authorisation of officials to perform particular ministerial functions must in any event be consistent with common law requirements of rationality and fairness … ."

29. Lord Reed went on to state, at [78], that under rule 45, authority to detain beyond 72 hours was given by the Secretary of State to the governor: it could not sensibly be construed either as enabling the governor to give authority to himself or as enabling

authority to be given to him by a subordinate officer. He noted, at [80], that the rationale of rule 45 was clear:

> "The governor can order segregation at his own hand for a maximum of 72 hours, but any longer period requires the authorisation of the Secretary of State - in practice, senior officials from outside the prison - in order to protect the prisoner against the risk of segregation for an unduly protracted period."

Lord Reed then considered, and rejected, a submission by the Secretary of State that there was no such rationale. At [88-90] he said:

> "88. … it can in my opinion be inferred that rule 45(2) is intended to provide a safeguard for the prisoner: a safeguard which can only be meaningful if the function created by rule 45(2) is performed by an official from outside the prison. It makes sense that the governor should be able to act at his own hand initially, since decisions to remove a prisoner from association with other prisoners may need to be taken urgently. It also makes sense that the governor should be able, under rule 45(3), to arrange for the prisoner's resumption of association with other prisoners at any time and, in particular, in response to any medical recommendation. Rule 45(2) however ensures that segregation does not continue for a prolonged period without the matter being considered not only by the governor but also by officials independent of the management of the prison. …
>
> 89. It follows that it is implicit in rule 45(2) that the decision of the Secretary of State cannot be taken on his behalf by the governor, or by some other officer of the prison in question. The *Carltona* principle cannot therefore apply to rule 45(2) so as to enable the governor or other prison officer to exercise the powers of the Secretary of State….
>
> 90. Any purported performance of the Secretary of State's function under rule 45(2) by a governor or other prison officer cannot therefore be treated as constituting performance by the Secretary of State. The Secretary of State's purported delegation of his function under rule 45(1) to the chairman of the SRB, in terms of the PSO, was therefore unlawful."

30. In *R on the application of Justice for Health Limited v The Secretary of State for Health* [2016] EWHC 2338 (Admin) ("*Justice for Health*") one of the grounds of challenge to NHS terms and conditions of employment for junior doctors was that the manner in which the Minister decided to impose those new terms and conditions was so opaque and confused that it violated the principles of transparency and good administration. At [6], Green J (as he then was) summarised those principles (which he later reiterated in more detail at [141]):

> "These are important principles of public law and, in essence, require public bodies to formulate and apply policies in a clear, precise and transparent manner so that those subject to or affected by them know where they stand and can regulate their affairs accordingly. The principles are also important so that those affected by a decision that might be adverse to them can make representations to the decision maker before the decision is taken and/or know the reasons for the decision taken subsequently so that they can decide whether to challenge it in the courts."

31. At [142] Green J cited the decision of the European Court of Human Rights in *Al-Nashif v Bulgaria* 36 EHRR 37:

> "In addition, there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by the Convention. It would be contrary to the rule of law for the legal discretion granted to the executive in areas affecting fundamental rights to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual protection against arbitrary interference …"

32. I can now turn to the claim for judicial review in these proceedings.

**The judicial review proceedings**

33. In her claim issued on 1st November 2016, the appellant advanced five grounds for judicial review:

> "1) The failure to develop and publish a formal policy or formal guidelines in relation to removal from association under Rule 40 of the Detention Centre Rules 2001 is contrary to the common law requirements of clarity and transparency in relation to the exercise of broad statutory discretions;
>
> 2) The failure to provide the claimant, or indeed any detainee, with a reasonable opportunity to make representations in relation to the decision to continue with removal from association beyond a period of 24 hours is contrary to the common law requirements of procedural fairness;
>
> 3) The decisions to remove the claimant from association and (subsequently) to continue removal past the 24 hour mark were unlawful in that they were not properly authorised;

4) The decision to remove the claimant from association was irrational in all the circumstances;

5) The claimant's removal from association constituted a breach of her rights under article 8 of the European Convention on Human Rights."

34. Permission to apply was granted on the first three of those grounds but refused on the fourth and fifth grounds. The claimant renewed her application for permission on those two grounds. That application was to be heard at the outset of the substantive hearing before Holman J, which began on 21st July 2017.

**The hearing before Holman J**

35. The judge noted that some of the grounds raised broad challenges to the lawfulness of the RFA process, whilst others were specific to the circumstances of the appellant's case. He emphasised that under Rule 40, the test requires that it is necessary in the interests of security or safety that the detainee concerned should not associate with other detainees: RFA is therefore a serious matter. In a contracted-out IRC, any RFA must be authorised by the Secretary of State, subject only to the limited exception in Rule 40(2) which permits the manager of the IRC, in a case of urgency, to assume the responsibility in this regard of the Secretary of State (though only to the extent of authorising an RFA of up to 24 hours). The judge accepted the appellant's submission that an official who authorises RFA under Rule 40 must be independent of the management of the IRC concerned, and must not be employed by the IRC or its managing company. He did not however accept the further submissions that the official must also be physically located outside the IRC and must be of higher seniority than a manager.

36. In advancing those submissions, counsel for the appellant had relied upon what was said by the Supreme Court in *Bourgass*, in particular at paragraphs 80 to 88 (cited at [29] above). The judge noted two very significant differences between *Bourgass* and the present case: first, the difference between detention in prison as the punishment of a convicted offender, and detention of an immigrant awaiting removal; and secondly, the very different terms of Prison Rule 45 (which permits RFA where it "appears desirable, for the maintenance of good order or discipline or in [the prisoner's] own interests") and Rule 40 (which permits RFA only where it "appears necessary in the interests of security or safety"). He nonetheless regarded the decision in *Bourgass* as relevant to the present case because of the degree of overlap between the two sets of provisions.

37. The judge accepted a submission on behalf of the respondent that at [80] Lord Reed had not been requiring authorisation by a "senior official", but had merely been recognising what in practice would happen. He noted that the word "senior" did not appear in paragraph 88, which contained the Supreme Court's conclusion. He rejected the appellant's submission that the use of the phrase "from outside the prison" required that the official giving the relevant authorisation must be physically located outside the prison. In the judge's view, that was too literal a reading. He concluded, at paragraph 52 of his judgment, -

> "The essence of the requirement is that the official must be 'independent of the management of the prison' or, in this case, the detention centre."

38. The judge further concluded, at [54], that neither Rule 40 nor anything said in *Bourgass* was prescriptive as to a minimum level of seniority of an official who may exercise the powers of the Secretary of State under Rule 40. He continued:

> "55 In my view, it is not open to me to hold that the contract monitor for a removal centre, who has the status conferred by, and who is exercising, the statutory duties imposed by section 149 (4) to (7) of the 1999 Act, is not of sufficient seniority, nor sufficiently independent to exercise the power of the Secretary of State, whether he or she is physically located within the removal centre or not.
>
> 56 I thus conclude that Ms Fiona Quaynor was a person who could lawfully give the authority of the Secretary of State on 1st August 2016 as she did."

39. The judge went on to find, at [63], that he must and did assume that Ms Quaynor had conscientiously discharged her duty, had not merely acted as a rubber stamp, and had adopted the reasons given by M Robinson as her own.

40. In relation to the RFA of the appellant after the expiration of the first 24 hours, the judge noted the absence of any entry in the relevant sections of the form DCF1, and concluded on the balance of probabilities that there was no authorisation by the Secretary of State for the continued RFA after 1230 on 2nd August 2016. It was in those circumstances that the judge found, in relation to ground 3, that the claim based on a lack of due authorisation succeeded only in respect of the period after the first 24 hours of RFA.

41. Having made that finding, the judge concluded that it was not necessary for him to make any determination in respect of ground 2, because that ground had been put forward only on the basis of the lack of any opportunity to make representations about continued segregation after 24 hours. As the judge had already found continued segregation after that time to be unlawful for another reason, it was neither necessary nor appropriate for him to make any ruling.

42. As to ground 1, the absence of any published policy or guidance, the judge accepted that in early August 2016 there was "negligible published policy or guidance" by the Secretary of State in relation to Rule 40 and RFA in IRCs, in contrast to the detailed provisions of Prison Service Order 1700 in relation to segregation in prisons. The judge referred to the principles of transparency and good administration of which Green J had spoken in *Justice for Health* at [141] and to the line of decisions beginning with *Lumba* in respect of unpublished or secret policies. The judge drew a distinction between a "policy" document, and "guidance" as to the requirements of, and procedures relating to, Rule 40. At paragraph 96 of his judgment he said:

> "This is not a case where there was an unpublished and "secret" policy in conflict with the published one as in *Lumba*. This is not a case where there was a published policy document but it was unclear or ambiguous. The Rule itself is clear, and what is required is not a policy in elaboration of it, but some clear guidance as to its practical and procedural application. I do not consider that the absence of a policy document in August 2016 was unlawful and I dismiss the claim under ground 1."

The judge went on to accept that there was a need for guidance as to some of the issues which may require to be considered in deciding whether the test in Rule 40 is made out, but then noted that the recent issuing of Detention Services Order 02/2017 meant that it could no longer be said that there was an absence of guidance.

43. The judge considered grounds 4 and 5, in respect of which the appellant had renewed her application for permission to apply for judicial review. As to ground 4, the judge acknowledged that "there may be force" in the appellant's submissions. He noted that the form DCF1 did not refer to the requirement of necessity, and focused on the events of 5th May 2016 without mentioning the absence of any physical resistance on 19th May. He accepted that there were therefore "grounds for concern" as to the rationality of the RFA decision on 1st August 2016. He found however that he had no sufficient case-specific evidence and no evidence as to any individual risk assessment which may have been undertaken, and he was not able to make any considered assessment and ruling on the rationality of the decision made. He therefore refused the renewed application in respect of ground 4. As to ground 5, the judge accepted that the appellant's article 8 rights were engaged, and that the interference with those rights by the respondent therefore had to be justified. There could be no justification in respect of the RFA after the first 24 hours, because he had held that later period of RFA to be unlawful: accordingly, the RFA after 1230 on 2nd August 2016 was not "in accordance with the law" for the purposes of article 8(2). The judge therefore granted permission limited to that period. As to the first 24 hours, however, he found that he was unable to make a considered assessment and ruling upon justification.

44. Having for those reasons found in the appellant's favour to only a limited extent, the judge concluded that an award of damages was not necessary to afford just satisfaction to the appellant. He therefore granted no relief other than a declaration as to the unlawfulness of the RFA after 1230 on 2nd of August 2016.

45. There is no cross-appeal by the respondent against the judgment in the appellant's favour.

46. I add for completeness that on 16th February 2018 the appellant submitted a fresh claim on asylum and human rights grounds. The respondent has agreed to consider that claim, but no decision has yet been made.

47. I can now turn to the appeal to this court.

## The grounds of appeal

48. The grounds of appeal contend that the judge fell into error in three respects:

i) in his approach to determining whether the initial period of segregation was properly authorised, in particular by misconstruing the applicable passages in *Bourgass*;

ii) in refusing permission on the appellant's rationality and proportionality challenges on the basis that there was insufficient evidence to determine them;

iii) in his approach to the common law requirements of clarity and transparency, in particular by drawing what was in the circumstances an unfounded distinction between "policy" and "guidance".

In terms of the original grounds on which judicial review was claimed (see [33] above), the first ground of appeal relates to ground 3; the second ground of appeal relates to grounds 4 and 5; and the third ground of appeal relates to ground 1.

**The submissions on appeal**

49. I am grateful for the submissions of counsel, which were of a high quality.

50. In respect of the first ground of appeal, Mr Knafler QC for the appellant submits that the decisions in *Carltona*, *Oladehinde* and *Bourgass* establish that, whilst the respondent's functions may be exercised by an official on his behalf, the selection of the official is, in principle, amenable to judicial review on grounds of inconsistency with the language and intention of the relevant legislation, unfair process, irrationality or some other public law error. Here, the appellant relies on the first two of those possible grounds. The serious consequences for an individual detainee of any period of RFA mean that decisions under Rule 40 are decisions of a kind which Parliament must have intended to be taken by senior officials. It is submitted that the role of a contract monitor is essentially an ancillary one, limited to monitoring and reporting: see IAA 1999 section 149(4)-(7), especially subsections (6)(a) and (7)(a). In addition, Rule 48 of the Detention Centre Rules 2001 requires (without prejudice to the duties under section 149(7) of IAA 1999) that the contract monitor at a contracted-out detention centre must investigate promptly any complaint made against any officer at that centre. Mr Knafler submits that section 149 and Rule 48 contain a complete list of the functions of a contract monitor, and that exhaustive list does not include the making of decisions as to the RFA of a detainee. He argues that the person appointed as a contract monitor cannot take on any other role in relation to the detention of detainees. By section 148(5) of IAA 1999, the manager of a contracted-out IRC cannot authorise RFA except in cases of urgency: Mr Knafler submits that Parliament cannot have intended that the contract monitor, whose role is to monitor the manager, should have wider powers in this regard. In such a situation, an important level of protection for the detainee provided by IAA 1999 section 149(7) would be removed.

51. Mr Knafler points to the duty of the contract monitor under section 149(7)(b) and submits that the authorising of RFA is a custodial function to which that subsection applies. Parliament cannot have intended that a contract monitor should investigate and report on an allegation against himself. It must have intended that a contract monitor would not exercise any custodial functions and would only investigate and report on those who did. He submits that this conclusion should be reached whether the issue is looked at as a matter of statutory construction or as a matter of fair process.

52. Rule 40 does not specify who may act for the Secretary of State in the authorisation of an RFA. Mr Knafler submits there must plainly be some limit to the power of the Secretary of State to select someone to act on his behalf: he surely could not, for example, appoint a very junior administrative officer to discharge such an important function. Under Rule 40(1), the only person who can authorise RFA in a directly managed IRC is the highest official, namely the manager. One would expect Rule 40 to provide an equal level of protection for all detainees, whether they be held at a contracted-out or directly managed centre. It follows, he submits, that Rule 40(1) requires that the official who authorises RFA in a contracted-out detention centre must be at least equal in status to the manager, and based outside the detention centre. Under Rule 40(3), logic requires that the Home Office official who authorises RFA beyond 24 hours must be senior in status to the manager of a directly managed detention centre who authorised the initial detention. It is therefore unlawful for the respondent to select, as the official who will decide whether to authorise RFA pursuant to Rule 40, the person who holds the role of contract monitor.

53. That conclusion, it is submitted, is consistent with the purpose of Rule 40(1) and (3), which is to protect a detainee against inappropriate RFA, and with the need to ensure that such protection is practical and effective. It is also consistent with the reasoning of the Supreme Court in *Bourgass*, in particular with Lord Reed's statement at [88] that the equivalent safeguard under the Prison Rules would only be meaningful if the decision was made by an "official from outside the prison". It is submitted that if the official acting for the Secretary of State is not a senior official, he or she may be reluctant to challenge the manager of the IRC. The appellant's written submission contended in this regard that the judge failed to have regard to "the common-sense proposition" – said to be implicit in the reasoning in *Bourgass* – that a contract monitor who operates on the site of the IRC is more likely to be influenced by, and to conform to, its operational culture. A similar reluctance may be displayed if the relevant official operates within the buildings of the IRC concerned. Fair process also requires that there should be no appearance of any such reluctance: Mr Knafler relies in this regard on *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115, especially at [65] and [90]. It does not look fair for a relatively junior official, who is (in Mr Knafler's phrase) embedded within the IRC, to take the decision to authorise RFA. The mere fact that a person occupies the role of contract monitor under section 149 of IAA 1999 does not mean that he or she is sufficiently independent for the purposes of Rule 40. In the present case, an officer of only Higher Executive Officer grade, located with her staff at Yarl's Wood, could not provide an adequate safeguard of the appellant's rights.

54. In response to this first ground of appeal, Mr Tam QC pointed out that RFA involves separation from the general population of detainees in the IRC but does not involve solitary confinement: if other detainees are subject to RFA at the same time, they too will be in the relevant accommodation. Moreover, RFA may be ordered at the request of a detainee himself. Thus, submits Mr Tam, the context of RFA in an IRC is significantly different from the context of RFA in a prison which was the subject of the decision in *Bourgass*.

55. Mr Tam submits that as a general rule a civil servant is entitled to exercise the respondent's powers in respect of RFA, and by virtue of the *Carltona* principle the decision made is the decision of the respondent. There was nothing to displace that

general rule in the present case, and Ms Quaynor was entitled to make the respondent's decision as to RFA. Mr Tam accepts that, in principle, the selection of Ms Quaynor by the respondent is amenable to judicial review, but submits that neither statute nor caselaw provides any authority for the appellant's contention that a civil servant with the role of contract monitor cannot carry out any function in relation to RFA other than those specified in section 149 and Rule 48. He submits that a contract monitor is in the position which *Oladehinde* recognises, of holding a statutory office with certain specific functions but also being a Crown servant capable of exercising the respondent's powers. He relies on the passage in Lord Griffiths' speech which I have quoted at [23] above. He contrasts the position in *Bourgass*, where after a most detailed analysis the Supreme Court concluded that prison governors and prison officers hold independent statutory offices, are not part of the Home Office (or, now, the Ministry of Justice), and cannot act for the respondent under the *Carltona* principle. The role of the contract monitor, he submits, has all the hallmarks of a departmental official who also has a specific statutory function. IAA 1999 sections 148 and 149 allocate certain functions in a contracted-out IRC as between the manager of the IRC and the contract monitor; but section 149(6)(b) states that the contract monitor has the status of a Crown servant.

56. Mr Tam accepts that if an official with the role of contract monitor has made an initial decision as to RFA, and there is a challenge to that decision, it would obviously be undesirable for the official to be the investigator in that case. But that situation, if it ever arises, will not give rise to any actual problem, because the respondent would always be able to appoint someone else to take on the investigation and report. It does not provide any ground for saying that there is a legal bar to a contract monitor making the respondent's decision as to RFA.

57. Mr Tam points out that nothing in either the statute or the Rules specifies any minimum grade of official who can exercise that power. Nor is there any specific requirement as to where the relevant official should be located. An initial authorisation of RFA is most aptly taken by a person who is on site at the IRC and has ready access to all relevant information. It is accordingly contended that the interpretation of Rule 40 for which the appellant argues would amount to judicial legislation. In addition, Mr Tam submits, the suggested imposition of a minimum requirement as to grade would be unworkable: the manager employed by a private contractor is unlikely to be a Home Office employee with a Home Office grade, and it is therefore meaningless to impose a statutory requirement as to a minimum Home Office grade. Moreover, the manager of a directly managed IRC, who would be a Home Office employee, can authorise RFA. Mr Tam argues that it would be illogical to interpret Rule 40 in a way which made it necessary for RFA to be authorised in a contracted-out centre by an official of a higher grade than could grant authority in a directly managed centre. He further submits that the judge was correct to reject the argument that location on the site of the IRC precludes the official from being sufficiently independent. If in a specific case there was a basis for contending that the relevant official had failed to show sufficient independence in his or her decision-making, an aggrieved detainee could argue that point; but that was not the position in the present case (the judge specifically rejecting a suggestion that Ms Quaynor had merely acted as a rubber stamp of the decision taken by the manager), and there is no basis for saying as a matter of generality that a Home Office official based at the IRC cannot be sufficiently independent in this regard. The judge was therefore correct to

find that a contract monitor (whose other duties under section 149 of IAA 1999 require him or her to be independent of the contractor who operates a contracted-out IRC) is a sufficiently independent person for the purposes of authorising RFA.

58. As to ground 2, it is submitted for the appellant that the approach taken by the judge to the renewed applications for permission was contrary to principle. The judge was required to consider the applications on the basis of the available evidence. Given that the respondent had had several months in which to consider and respond to the claimant's grounds, and had in fact filed two witness statements and a significant amount of documentary evidence, an absence of evidence relevant to these grounds should, if anything, have been a ground for finding against the respondent: it was certainly not a ground for declining to engage with the issue at all. Nor could it have been proper for the judge to refuse to engage with the issues raised by judicial review grounds 4 and 5 for case management reasons connected to the likelihood of an adjournment if permission were granted at the substantive hearing: again, there had been time for the respondent to prepare to meet that eventuality, and no application for an adjournment had been made. Moreover, the respondent's duty of candour required him in any event to file all the documents which were needed to enable the court to determine the issues, and the only contemporaneous statement of the reasons for the RFA was available in the form DCF1: there was therefore no basis for thinking that the respondent would have been able to adduce further relevant evidence even if granted further time. Mr Knafler also points to the judge's acceptance that the appellant's article 8 rights were engaged (see [43] above), so that there was a burden on the respondent to justify the undoubted interference with those rights. In short, the appellant submits that the judge was obliged to consider the appellant's grounds and was wrong to refuse to do so. Given that the entirety of the respondent's reasons for the appellant's RFA are those set out in the form DCF1, the appellant contends that on any proper consideration of these two grounds, permission should have been granted on both grounds 4 and 5 of the grounds for judicial review.

59. In support of this submission, Mr Knafler points to the observations made by the judge (and quoted at [43] above) that "there may be force" in the appellant's argument, and that there were "grounds for concern" as to the rationality of the decision in respect of RFA. The appellant further relies on the fact that the judge noted that the reasons recorded on the form DCF1 did not expressly refer to "and may not imply" the requirement of necessity in Rule 40.

60. Mr Knafler also submits that on the available evidence, it was clearly arguable that the RFA decision was irrational and a disproportionate interference with the appellant's article 8 rights. He makes a number of points in support of this submission. The reasons given on the form DCF1 say that RFA has been "deemed appropriate", not that it was necessary in the interests of security or safety. The events of 5th May 2016, if they were relevant at all, did not provide any sufficient basis for RFA: the appellant's conduct on that occasion did not jeopardise either the safety of any person or security generally. In any event, RFA could not eliminate any risk of a repetition of misconduct on 3rd August 2016. No reason has been shown why RFA was necessary on 1st August, more than 24 hours before the scheduled removal. No reason has been given as to why RFA was necessary in August when it had not been necessary on 19th May 2016. No enquiry had been made of the appellant herself as to whether she intended to resist her removal, or as to whether she would

give an undertaking not to do so. No account had been taken of her being a potential victim of torture.

61. Mr Tam began his submissions on this second ground by emphasising that this court is hearing an appeal against the refusal of permission to apply for judicial review. He submits that the judge made what was, in effect, a discretionary case management decision which he was entitled to make, namely that he did not have the case-specific material which he needed to determine the application for permission on grounds 4 and 5. He submits that this court should in any event conclude that the RFA decision was not even arguably irrational, and that accordingly the challenge to the judge's ruling is immaterial. The alternative would be to remit the renewed application for permission to apply to the High Court, allowing the respondent to adduce any evidence on which he might wish to rely.

62. As to whether the RFA decision was arguably irrational, Mr Tam submits that the appellant's immigration history showed a protracted record of refusals to cooperate notwithstanding that she had never been able to advance any meritorious ground for her applications for leave to remain. On 5th May 2016, she made an invalid application: she had no good reason for being granted leave to remain, but she was disruptive. Moreover, she gave an account of the events that day which the later investigation, including by reference to CCTV footage, showed to be untrue. On 19th May 2016, when she was physically compliant, Mr Tam suggests the appellant must have known she was going to make her belated claim for asylum and thereby cause the removal directions to be cancelled, and therefore had no reason to be physically disruptive. Against the background of the immigration history, and the incident of 5th May 2016, the prospective removal in August was a sensitive matter. It is unrealistic to suggest that the respondent could ask the appellant for, and rely upon, an undertaking that she would not again be disruptive. It was necessary to have regard to how other detainees might react in the event of further disruption. In those circumstances, RFA could not be said to be an irrational decision. True it is that the appellant might be disruptive even if being removed after a period of RFA; but Mr Tam suggests the RFA might encourage her to believe that further disruption would not achieve anything, and would have the important advantage that any disruption would take place away from the general population of detainees.

63. As to the third ground of appeal, the appellant submits that the cases mentioned by the judge, and also *Detention Action*, show that public authorities may be required to publish a policy which provides a transparent statement by the executive of the circumstances in which a statutory power will be exercised. Whether there is a duty to do so, and if so, what level of detail is required, will depend on all the circumstances. Mr Knafler submits - relying on *Lumba*, in particular the passages quoted at [24-25] above, and on *Justice for Health*, in particular at [141-142] (see [29-30] above) - that where the statutory power involves deprivation of liberty, a published and detailed policy is necessary. Further, where (as in this case) fundamental rights are affected by the exercise of the power, an individual must be able to know what the authority can or cannot do; and he must be protected against arbitrary interference with such rights. He accepts that Rule 40 does itself contain criteria for its application, which was not the case with the relevant statutory power in *Lumba*; but he submits that Rule 40 does not satisfy the test in *Al-Nashif v Bulgaria*, cited in *Justice for Health*. He further accepts that this is not a case in which the

exercise of the power means the difference between liberty and deprivation of liberty, but submits that RFA is nonetheless a serious matter which can result in segregation for up to 14 days and thereafter indefinitely if further extensions are authorised.

64. Mr Knafler goes on to argue that the test under Rule 40 is a broad one, and, without guidance, there is an obvious risk of inconsistent decisions. As the judge found, there was minimal published policy or guidance in respect of the Rule. In those circumstances, the judge was wrong to draw a distinction between policy and guidance: the important point is whether Rule 40 itself provided sufficient guidance as to the exercise of the power, because if it did not, then something else was needed, whatever label may be given to it. He submits that there clearly was an absence of clarity and transparency, as the subsequent publication of the Detention Services Order confirms, and it was therefore necessary for the respondent to spell out, in guidance supplementing Rule 40, matters such as the following: what was meant in practice by "safety or security"; how serious a threat must be established before RFA was "necessary"; what was the position of vulnerable detainees; whether, in a non-urgent case, the detainee should have an opportunity to give an undertaking which would make RFA unnecessary; what would be the criteria for an extension pursuant to Rule 40(3); and what level of official should take decisions as to RFA. The absence of any such clarification or guidance resulted in this case, he submits, in arbitrary decision-making, in particular having regard to the fact that no RFA had been used on 19th May 2016. The appellant does not seek to quash Rule 40, or to challenge the entire scheme (as was the case in *Detention Action*); but a detailed statement of policy was necessary and was missing.

65. Mr Tam in reply points out that Rule 40 itself sets out the specific criteria for the exercise of the power, which relates to the conditions of continuing detention rather than deprivation of liberty. He submits that no further statement of policy is required by law. The content of the recent Detention Services Order is largely procedural, and does not elaborate upon the meaning of Rule 40, which (Mr Tam suggests) is as one would expect when Rule 40 is itself sufficiently clear. The position was very different in *Lumba*, which did concern deprivation of liberty from those who would not otherwise be detained: the relevant statutory provision in that case gave no indication as to the circumstances in which an apparently wide power would in practice be exercised, and the relevant decision had been made by applying an unpublished policy which conflicted with a published policy. In *Justice for Health*, the relevant decision was said to have been taken in so opaque and confused a manner as to violate the principles of transparency and good administration. That case also was far removed from the present situation. Relying on the decision in *Detention Action*, especially at paragraph 27 (quoted at [26] above), Mr Tam submits that it was incumbent upon the appellant, in advancing this ground, to show a high systemic risk of illegality, going well beyond the mere possibility that an individual decision might be flawed. The appellant failed to discharge that burden. Accordingly, there was no obligation on the respondent to publish either policy or guidance in order for the exercise of the power of RFA to be lawful.

**Discussion**

66. Having necessarily set out the relevant history and the submissions at some length, I can express my views comparatively briefly.

67. In relation to a detainee held at a contracted-out detention centre, the effect of Rule 40(1) is that an initial decision as to RFA must be taken by the respondent in all save cases of urgency. The decision in the present case was not one made as a matter of urgency: it was the respondent's decision, made by Ms Quaynor on his behalf. Ground 1 contends that in law, the respondent was not entitled to appoint Ms Quaynor to act for him in this regard. I accept that the respondent's selection of an official to act on his behalf in this respect is, in principle, amenable to judicial review on the grounds which Mr Knafler identifies. I do not however accept that it was unlawful for the respondent to select, for this purpose, the official who held the post of contract monitor in respect of Yarl's Wood.

68. The fact that Ms Quaynor held the post of contract monitor in itself gives rise to a clear inference that she was an official of significant standing and experience in the respondent's department: there is, therefore, no question of the respondent having inappropriately selected a very junior and inexperienced official to make an important decision concerning RFA. Moreover, there is nothing in IAA 1999 or in Rule 40 which imposes any express requirement as to the grade or rank of official who can take decisions as to RFA, and nothing which expressly prohibits the contract monitor of the IRC from taking such decisions. The appellant's case rests substantially on seeking to align this case with the decision in *Bourgass* as to the analogous, but materially different, statutory provisions governing segregation in a prison. In my view, the appellant's submissions are not supported by the decision in *Bourgass* and are inconsistent with *Oladehinde*. Furthermore, the interpretation of Rule 40 for which the appellant contends would lead to anomalous and impractical results.

69. In *Bourgass* at [80], quoted at [29] above, Lord Reed was in my view doing no more than indicating what in practice would happen in the circumstances of that case. I cannot accept that his parenthetical observation was intended to lay down a rule that in different circumstances an official taking a decision as to RFA must of necessity be based somewhere other than the custodial institution concerned. I agree with Mr Knafler that Rule 40, like Rule 45 of the Prison Rules 2001, has a protective purpose; and I accept that, in order to protect a detainee against an arbitrary initial decision as to RFA, the decision must be taken (or in cases of urgency, reviewed) by someone who is independent of the management of the detention centre concerned. I do not however accept that the fact that the official who takes the decision as to RFA also acts as contract monitor in respect of that centre means that he or she is necessarily lacking in independence; and I do not read Lord Reed's words in *Bourgass* at [88] as imposing either a minimum requirement as to the rank or status of the official, or a requirement that the official be based somewhere other than the detention centre. The speech of Lord Griffiths in *Oladehinde*, quoted at [23] above, shows that an individual may both be a Crown servant and hold a statutory office; and in my view, IAA 1999 section 149(6)(b) makes it clear that Ms Quaynor was at all material times in exactly that position. I can see no reason why as a generality the holding of the position of contract monitor should compromise Ms Quaynor's ability to act independently, or to be seen to act independently, of the centre's management in taking a decision as to RFA. It is of course possible that in a particular case an official in a position comparable to that of Ms Quaynor might in fact lack the necessary independence when taking a decision as to RFA, or might give the appearance of lacking independence; but different considerations would then arise, and it is not suggested that the present is such a case.

70. There are moreover two practical obstacles to the appellant's submissions which, in my view, are insuperable. First, it is not possible to equate the grades or ranks of staff employed by a contractor responsible for the management of a contracted-out detention centre with the grades or ranks of officials in the respondent's department. It therefore cannot be said that a Higher Executive Officer such as Ms Quaynor is necessarily either senior or junior in standing to the manager of a particular detention centre. Even if the positions were commensurable, which they are not, the appellant's submissions would have the consequence that the respondent's selection of an official to take decisions as to RFA would be dictated by the wholly unconnected decisions of private contractors as to the grade or rank of employee they decided to appoint to the role of manager of a particular centre. What if the contractor decided, for purely commercial reasons, to down-grade the post of manager in its institutional hierarchy? What if, in the temporary absence of a manager through ill-health, the contractor chose to deploy at the centre an employee of a higher status in its hierarchy? I cannot think that Parliament intended that matters such as those would dictate the respondent's choice as to who might be appointed from time to time to take decisions as to RFA on his behalf.

71. Secondly, with all respect to Mr Knafler's submissions, the argument that the respondent's official must be based somewhere other than at the detention centre concerned seems to me to lack any logic. It assumes that mere physical proximity to those concerned with the management of the IRC necessarily compromises, or appears to compromise, independent decision-making by the official. But why should that be so? As an abstract proposition, the possibility that a civil servant based at a detention centre will instinctively want to support the views and wishes of persons employed by the contractors who manage the centre seems to me no more likely to be true than the contrary possibility that a civil servant in that position will instinctively want to demonstrate his or her independence at every opportunity. Moreover, it can be assumed that a civil servant who acts as contract monitor in respect of a detention centre, wherever he or she is based, will in any event have regular dealings with those who manage that centre. I can see no reason why independence will be compromised by co-location when there is no suggestion that it will be compromised by regular contact and communication. I see no warrant for assuming that officials appointed by the respondent to make decisions about RFA will not do their duty, and will not exercise independent judgment, merely because they feel inhibited in disagreeing with an IRC employee who is based at the same location. It is to be noted that an official may be appointed by the respondent to act as contract monitor in respect of more than one detention centre. In such a situation, Mr Knafler's argument would lead to the conclusion – in my view, unsustainable - that the individual concerned should simultaneously be regarded as lacking independence in respect of the centre at which he or she happened to be based, but independent in respect of any other centre or centres.

72. In addition, I accept Mr Tam's submission that an initial decision as to RFA - which will at most have effect for only 24 hours – can most conveniently be taken by someone who is on site or close at hand and who therefore has ready access to all necessary information.

73. Those seem to me to be powerful reasons why the appellant's submission on this first ground cannot be correct. They are not, in my view, undermined or contradicted by

Mr Knafler's point that Rule 40 could otherwise lead to a situation in which an official in the respondent's department was called upon to investigate and report into his or her own initial decision as to RFA. I accept that the making of a Rule 40 decision as to RFA is a "custodial function" within the ambit of IAA 1999 section 149(7)(b); and I accept that it would plainly be inappropriate for the same official both to take the initial decision and to investigate it. But I agree with Mr Tam that, if such a situation arose, there would be an obvious solution to it, and a remedy available to any detainee adversely affected by the decisions of the official concerned. It is not necessary, in order to avoid the possibility to which Mr Knafler refers, for this court to declare it to be unlawful for the respondent to appoint a contract monitor to take an initial decision as to RFA.

74. In my judgment, the judge was therefore correct to reject the appellant's argument that it was unlawful for the respondent to appoint, as the official making the decision as to the RFA of the appellant, the person who held the role of contract monitor in respect of Yarl's Wood.

75. Turning to the second ground, there was some disagreement between the parties as to the basis on which the renewed application for permission to apply for judicial review on grounds 4 and 5 was listed to be heard on the same day as the substantive hearing on grounds 1-3. The parties have helpfully looked further into this since the hearing, and it is now clear that there was no formal order for a rolled-up hearing. The respondent submits that he was therefore faced only with a renewed application for permission on grounds 4 and 5, and was not obliged to file all his evidence in preparation for a substantive hearing of those grounds. The appellant submits that it was obvious to the respondent, and was in any event a matter of common sense, that if permission were granted the substantive hearing would follow, and that accordingly the respondent should have been prepared for a substantive hearing on grounds 4 and 5.

76. This issue perhaps serves to underline the importance, in a case in which there is to be both a substantive hearing of one or more grounds for judicial review and a renewed application for permission to apply on another ground or grounds, of the parties being entirely clear as to precisely what order they are asking the court to make as to the listing of those discrete issues.

77. In the absence of an explicit order for a rolled-up hearing, or any other order which would have had the effect of requiring the respondent to be ready to meet a substantive claim based on grounds 4 and 5 if permission were granted by the judge, the respondent was, in my view, entitled to treat the application in respect of those grounds as no more than a renewed application for permission to apply.

78. There is, nonetheless, force in the point that the appellant was entitled to have her application determined. I am not entirely sure, though I think it may well be the case, that the judge concluded that the appellant had failed to make out an arguable case. He was entitled to apply the presumption of regularity and, therefore, to assume that the decision-maker had acted rationally unless the appellant could make out an arguable case to the contrary; but with all respect to the judge, I do not find it clear from his judgment whether that was in fact his approach.

79. However, I do not think it necessary to examine this aspect of the case in further detail, because even if the judge took a wrong approach, I have no doubt that a challenge to the rationality of the RFA decision would fail and that permission to apply for judicial review on ground 4, and on ground 5 in relation to the first period of 24 hours, was correctly refused. It would have been better if the form DCF1 had explicitly referred to the test of necessity; but I have no doubt that the test was satisfied, and that the contrary is not arguable. I cannot accept Mr Knafler's submission that the appellant's immigration history, and perhaps even her conduct on 5th May 2016, were irrelevant to the decision as to RFA. It was, on the contrary, plainly relevant. The immigration history shows that at every juncture, the appellant had been doing all she could to avoid being removed from the United Kingdom, despite the fact that she had been unable to show at any stage any basis on which she should be allowed further leave to remain. That history provided relevant background and context when deciding whether RFA was necessary in the interests of security or safety. It was also relevant to show, as Mr Tam submits, that it would be unrealistic to think that an assurance of good behaviour, even if requested of the appellant and given by her, could be relied upon. Against that background, the events of 5th May 2016 were a very important consideration: if such events were repeated, there would in my view be a clear risk to the safety of staff trying to remove the appellant, and perhaps to the appellant herself. In addition, in any custodial establishment there is an ever-present risk that misconduct by one detainee will provoke or encourage misconduct by others, and therefore a risk to security. There was no evidence before the judge as to why there had been no RFA in preparation for the removal planned for 19th May 2016; but in any event, the fact that the appellant did not show any physical resistance to her removal from the detention centre on that day has to be seen in the context of her having then promptly made a claim for asylum which - it is reasonable to infer – she had planned to make and knew would result in her removal being postponed. I accept Mr Tam's submission that although RFA could not guarantee that the appellant would not resist her removal, it would reduce the risk of her doing so and would make it significantly easier to manage her in a way which reduced the risk to safety and security. In those circumstances, the decision that it was necessary to remove the appellant from association with other detainees well in advance of the removal planned for 3rd August was not even arguably irrational, and the judge was correct to refuse permission to apply on ground 4, and on ground 5 in relation to the first 24 hours of RFA.

80. As to ground 3, both counsel were in my view correct not to enter into a detailed debate as to the judge's distinction between policy and guidance but instead to focus on the question of whether in all the circumstances the respondent was under a duty to publish some form of clarification or guidance as to the circumstances in which the power of RFA would be exercised. The answer to that question is in my view clear: rule 40 itself states in plain language that RFA is only permissible when it is necessary in the interests of security or safety that a detained person should not associate with other detained persons, either generally or for particular purposes. In my view, no clarification or amplification of that plain statement is necessary in law in order to explain when and how the power may be exercised. Given that the necessity may arise in an infinite variety of circumstances, there is in any event a limit to the extent to which any such clarification could inform or usefully assist. The fact that the respondent has subsequently felt it desirable to issue the Detention Services Order does not mean that it was necessary in law to do so.

81. Mr Knafler accepts that not every power has to be accompanied by a written policy. In the present context, the important question is whether a policy or guidance is needed to ensure that those who may be affected by an exercise of the power should know where they stand, and that detainees may be protected against arbitrary decisions. I agree with Mr Tam's submission that the judge was correct to say that Rule 40 itself sets out clear criteria, and that no formal policy is required by law in the interests of transparency.

**Conclusion**

82. In my judgment, and notwithstanding the very persuasive manner in which Mr Knafler made his submissions, each of the grounds of appeal fails. I would accordingly dismiss the appeal.

**Lord Justice Haddon-Cave:**

83. I agree.

**Lord Justice Floyd:**

84. I also agree.